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January 31, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Ex Parte Notice

Re: Implementation of Section **11** of the Cable Television Consumer Protection and Competition Act of **1992,** CS Docket **No. 98-82;** Implementation of Cable Act Reform Provisions ***of*** the Telecommunications Act **of 1996,** CS Docket **No. 96-85;** The Commission's Cable Horizontal and Vertical Ownership and Attribution Rules, MM Docket No. **92-264;** Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, MM Docket No. **94-150;** Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, MM Docket No. 92-51; Reexamination of the Commission's Cross-Interest Policy, MM Docket No. **87-154.**

Dear Ms. Dortch:

On January 30, 2003, representatives of Comcast Corporation ("Comcast") met with representatives of the Media Bureau to discuss the above-captioned rulemaking. Comcast was represented by James R. Coltharp, Senior Director, Public Policy, and by Michael H. Hammer and the undersigned, both of Willkie Farr & Gallagher. The Media Bureau was represented by Deborah E. Klein, Chief of Staff; William H. Johnson, Deputy Bureau Chief; Paul Gallant, Special Advisor to the Bureau Chief; Royce Sherlock, Chief of the Bureau's Industry Analysis Division; and Marcia Glauberman, Deputy Chief of that Division.

The discussion centered on points covered at length in documents previously filed by Comcast, as well as the ex parte report filed January 14. In particular, the Comcast representatives explained that marketplace facts -- and the record in the ownership rulemaking -- demonstrate conclusively that the quantity and quality of video programming available to consumers is at an all time high. The same is true of diversity, in terms of both sources and content. There is simply no evidence that there is any current impediment to the flow of video programming to consumers, much less one that is attributable to the number of cable subscribers one company serves.

The Comcast representatives also noted that the two principal theoretical approaches to analyzing horizontal limits involve monopsony and vertical foreclosure. Both of these concerns are addressed at length in the record and have been thoroughly discounted by eminent economists (including Paul Joskow, Janusz Ordover, Stan Besen, and Howard Shelanski). In light of the record, the *Time Warner II* decision gives the FCC virtually no opportunity to articulate a sustainable substantive limit. This suggests that the search for a "perfect" point of demarcation -- below which cable concentration will be automatically allowed and above which it will be strictly prohibited -- may be futile. If the Commission still feels a responsibility to prescribe some "limit," there may be alternative approaches, such as the adoption of a procedural trigger rather than a hard cap. Under such an approach, all proposed mergers would be reviewed, and subject to a public interest analysis, as has been the practice both with and without the presence of a horizontal ownership limit, but only those above a specified threshold would require the more detailed information submissions and market analysis that has taken place in recent MVPD merger proceedings.

The Comcast representatives noted that competition law and policy have generally rejected a reliance on a hard-and-fast rules in merger analysis. A full assessment of the public interest ramifications of any given merger proposal (or even of the merger's effect on the single topic of the flow of programming to the American consumer) necessarily requires a consideration of more than a one-dimensional measure of horizontal ownership interests -- or even a two-dimensional analysis of horizontal and vertical ownership interests. In short, circumstances matter.

In response to a question about vertical integration, Comcast's representatives made several separate points. First, the overall industry trend is decidedly *away* from vertical integration. The Commission's most recent video competition report found that (if Liberty Media, which has only a small number of cable subscribers, is excluded) the percentage of programming networks that are vertically integrated with cable operators has now (after years of decline) reached 20.6%. Second, vertical integration clearly has positive consequences that must be taken into account, as reflected in the recent announcement that Comcast and Radio One will join to launch a new network to provide a new viewing alternative for African American viewers. Third, to the extent one is focusing on joint action by two separate MSOs, there is a significant difference between a joint decision by two cable operators to launch a programming service and a joint decision by two cable operators to decline carriage of an independent programming service. It is only the latter that would impede the flow of programming to American consumers. The Court of Appeals has determined that the record underlying the previous ownership limit did not justify inferring a non-conjectural risk of collusive rejection, and that is also the state of the current record as well.

This letter is filed pursuant to section 1.1206(b)(2) of the Commission's rules. Copies are being sent to all of the Media Bureau representatives mentioned above. Please let me know if you have any questions.

Respectfully submitted,

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